

BEFORE THE
COPYRIGHT OFFICE LIBRARY OF CONGRESS Washington, D.C.

In the matter of exemption to prohibition on circumvention of copyright protection systems for access control technologies.

Docket No. RM. 2011-7

COMMENTS OF NEW MEDIA RIGHTS

New Media Rights submits the following comments in response to the Notice of Inquiry of Exemption to Prohibition on Circumvention of Copyright Protection Systems for Access Control Technologies.¹ In its Notice, the Copyright Office seeks comments on all proposed exemptions submitted before December 1, 2011.

These comments address the proposed exemptions requested by the Electronic Frontier Foundation (“EFF”), Proposed Classes 5, 7B, and 7C.²

Proposed Class 5 includes “[c]omputer programs that enable wireless telephone handsets (“smartphones”) and tablets to execute lawfully obtained software applications, where circumvention is undertaken for the purpose of enabling interoperability of such applications with computer programs on the handset or tablet.”

Proposed Class 7B includes “[a]udiovisual works on DVDs that are lawfully made and acquired and that are protected by the Content Scrambling System, where circumvention is undertaken for the purpose of extracting clips for inclusion in primarily noncommercial videos that do not infringe copyright, and the person engaging in the circumvention believes and has reasonable grounds for believing that circumvention is necessary to fulfill the purpose of the use.”

Proposed Class 7C includes “[a]udiovisual works that are lawfully made and acquired via online distribution services, where circumvention is undertaken for the purpose of extracting clips for inclusion in primarily noncommercial videos that do not infringe copyright, and the person engaging in the circumvention believes and has reasonable grounds for believing that circumvention is necessary to fulfill the purpose of the use, and the works in question are *not* readily available on DVD.

New Media Rights strongly supports the EFF’s proposed exemptions as they would not only benefit consumers, but are in harmony with the spirit, purpose, and law of the Copyright

¹ 76 Fed. Reg. 78866 (Dec. 20, 2011).

² Comments of the Electronic Frontier Foundation (hereinafter “EFF Proposal”), in the matter of exemption to prohibition on circumvention of copyright protection systems for access control technologies, Docket No. RM 2011-7, at <https://www.eff.org/sites/default/files/filenode/2012_dmca_exemption_requests_Final.pdf>, (December 1, 2011) at 1.

Act.³

I. COMMENTING PARTY

New Media Rights (NMR) is a project of the non-profit Utility Consumers' Action Network. New Media Rights provides one-to-one assistance to internet users, consumers, artists, non-profits, startups, and other creators who share their work online. When not helping individuals, we particularly focus on assisting organizations that provide better access to public information, more business and government accountability, or new perspectives to the cultural landscape. Our core mission is to ensure that quality legal help is available for internet users and digital creators, and to use our experience working one-to-one with individuals to inform both policy work and development of public resources and guides in the that will benefit these communities.

II. COMMENTS

A. Proposed Class 5: Renewing the jailbreaking exempting for smartphones and extending the exemption to tablets would allow for increased competition and innovation.

The exemption in Proposed Class 5 should be renewed and extended to tablets, thereby allowing consumers to jailbreak their devices. The ability to jailbreak is essential for competition and innovation. It is currently estimated that 44% of Americans own a smartphone and 19% of Americans own a tablet.^{4 5} These numbers are expected to continue to increase over the next year. The manufacturers of these devices have attempted to limit the use of these devices by blocking otherwise legal, independently created software applications, known as apps, that have not been approved by either the device manufacturer, the operating system maker, or the wireless carrier. Consumers have been able to work around these restrictions by jailbreaking, or rooting, their devices. Jailbreaking has allowed consumers to engage in otherwise legal activity that is blocked by the device manufacturer, operating system maker, or wireless carrier. Jailbreaking has given consumers an alternative marketplace to purchase apps, allowed consumers to gain a better understanding of how their devices work, and encouraged growth and development in the smartphone and tablet markets. The increased competition and innovation that results from jailbreaking has helped combat censorship and given consumers the ability to exercise self help. The exemption proposed in Class 5 is a narrow exception that would not have an effect on copyright owners ability to pursue copyright

³ United States Constitution, Section 8, "To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

⁴ Leslie Horn, Most American Own iPhone or Android Smartphone, PCMag.com (Nov 29, 2011), <http://www.pcmag.com/article2/0,2817,2397011,00.asp>.

⁵ Lee Rainie, Tablet and E-book reader Ownership Nearly Double Over the Holiday Gift-Giving Period, Pew Research Center (Jan 23, 2012), <http://www.pewinternet.org/Reports/2012/E-readers-and-tablets.aspx?src=prc-headline>.

infringement. NMR joins EFF in urging the Librarian to renew the jailbreaking exemption and to expand the exemption to include tablets.

1. Jailbreaking provides consumer protection since it fosters increased competition that leads to more choice, less censorship, and pressure for official app stores to improve their systems.

Jailbreaking on both iOS and Android, Apple and Google's mobile operating systems respectively, has led to increased competition. When iOS and the iPhone first came out in June 2007, there was no Apple App Store. The only way to get additional apps onto the phone was by jailbreaking. Jailbreaking methods were being distributed online by August 2007, only two months after the iPhone was released.⁶ The Apple App Store was not launched until July 2008, a year after the iPhone was released.⁷ Today, jailbreaking on iOS has led to the creation of a competing app store called Cydia. This alternative app store is only available on jailbroken iOS devices. Cydia hosts a wide range of apps that are not available in the official Apple App Store due to Apple's strict approval process. The Apple approval process has been criticized by numerous developers as being unpredictable, unclear, and subjective.⁸ The competition provided by Cydia allows consumers to access many otherwise legal applications that were rejected by Apple and encourages Apple to continuously improve its own App Store to compete with Cydia.

The app Frash, available in Cydia, provides iOS users with the ability to view Adobe Flash content. Apple made a business decision to block flash from their iOS devices. This decision was motivated by Apple's desire to adopt the HTML 5 standard and control the user experience on iOS. This decision frustrated a portion of the iOS user base since it prevented iOS users from accessing certain material online. This decision to block flash at the time made flash based online games and flash videos unavailable from iOS devices.⁹ The jailbreaking community allowed consumers to make their own decisions about using Flash on their devices, and gave consumers the ability to access otherwise legal content that happened to be delivered via Flash technology.

Jailbreaking Android phones, commonly referred to as rooting, also allows for increased competition. The process of rooting an Android phone allows a user to install applications that are not available in the Android Market, a process referred to as sideloading. This allows for consumers to access applications not approved by Google to be in the mainstream marketplace or apps in the Android Market that are blocked by the cell phone service provider. For instance, Verizon blocked the app Google Wallet on the Samsung Galaxy Nexus.¹⁰ Google Wallet is an application that allows for users to use their phone to pay at certain locations.

⁶ Timeline, The iPhone Wiki (Jan 30, 2012), <http://theiphonewiki.com/wiki/index.php?title=Timeline>.

⁷ Josh Smith, iOS and iPhone Timeline: From iPhone to iOS 5 in 5 Years, Gotta Be Moblie (July 3, 2011), <http://www.gottabemobile.com/2011/06/03/ios-and-iphone-timeline-from-iphone-to-ios-5-in-5-years/>.

⁸ Jim Dalrymple, iPhone app developer quits over approval process, CNET (Nov 16, 2009), http://news.cnet.com/8301-13579_3-10398624-37.html.

⁹ Andy, No Flash Support in iPhone OS: What is the Reason Behind it? Will it Matter in the Future?, iPhone Hacks (Jan 31, 2010), <http://www.iphonemobile.com/2010/01/no-flash-support-in-iphone-os.html>.

¹⁰ Verizon Wireless nixes Google Waller in new phone, Associated Press (Dec 6, 2011), <http://www.crainsnewyork.com/article/20111206/TECHNOLOGY/111209935#>.

Verizon's motive in blocking this application was argued by some to be related in part to the company's plans for designing a similar payment system in the future.¹¹

Alternative marketplaces also provide a safety valve to censorship by OS makers, wireless carriers, and device manufacturers, who use their gatekeeping power to control what apps and services we can access. In the past, Apple has denied apps such as iSinglePayer that advocated for a single payer health care system because it had a strong political message.¹² In the case of iSinglePayer, Apple later reversed the decision after the story started circulating on the web, but not every developer receives the same attention. Apps like Obama Trampoline and MyShoe, an app where the user could throw a shoe at President Bush, were both denied by Apple.¹³ Another app, FreedomTime, that provided a clock that counted down to the end of President Bush's term was rejected because the content violated the Community Standards.¹⁴ The Community Standard Apple cited stated, "Applications must not contain any obscene, pornographic, offensive or defamatory content or materials of any kind (text, graphics, images, photographs, etc.), or other content or materials that in Apple's reasonable judgement may be found objectionable by iPhone or iPod touch users."¹⁵ Developers are forced to guess what will be seen as objectionable to "Apple's reasonable judgement." The rejection comes after the developers have already invested time and money into the app. This encourages developers to play it safe since rejected apps will mean lost time and profit.

Additionally, Apple's method of screening apps to determine what content is appropriate has been inconsistent. For example, Gizmodo reported on Feb 3, 2012 that a scientific article on the penis had been rejected, while an article entitled "50 kinky sex moves" had been cleared.¹⁶ Both articles were in magazines released through iBooks and both were marketed for ages 12+. The reason given by Apple for the rejection of the scientific article was that the material did not correspond to the age group listed, 12+. Following this logic, Apple is stating that a scientific article on male anatomy requires a higher age restriction than an article about kinky sex positions. This inconsistency in App Store approval leads to censorship and confusion among developers as to what content will be found to be appropriate by Apple.¹⁷ The alternative marketplaces enabled by jailbreaking give consumers an option to access otherwise legal services and applications that the Operating System (OS) makers and wireless carriers choose to block for business and political reasons. These alternative marketplaces are only available through jailbreaking, and provide a safety valve to anti-competitive and speech restrictive actions by gatekeepers including OS makers, wireless carriers, and device

¹¹ Id.

¹² iSinglePayer iPhone App Censored by Apple, LambdaJive (Sep 26, 2009),

<http://lambdajive.wordpress.com/2009/09/26/isinglepayer-iphone-app-censored-by-apple/>

¹³ JR Raphael, 10 iPhone Apps That Didn't Make Apple's App Store, PCWorld (Feb 22, 2009), [http://](http://www.pcworld.com/article/159887/rejected_10_iphone_apps_that_didnt_make_apples_app_store.html)

www.pcworld.com/article/159887/rejected_10_iphone_apps_that_didnt_make_apples_app_store.html.

¹⁴ Freedom Time rejected by Apple for App Store, Juggleware Developers' Blog (September 21, 2008), [http://](http://www.juggleware.com/blog/2008/09/freedomtime-rejected-by-apple-for-app-store/)

www.juggleware.com/blog/2008/09/freedomtime-rejected-by-apple-for-app-store/

¹⁵ Id.

¹⁶ Jesus Diaz, Apple Censors: Kinky Sex and G-Spots Fine for 12 Year Olds, But Penis Bad, Gizmodo (Feb 3, 2012),

<http://gizmodo.com/5882034/apple-censors-science-magazines-article-about-penises>

¹⁷ Id.

manufacturers.

2. Jailbreaking leads to increased innovation that provides consumers with new technology and methods of self help.

The ability for people to jailbreak has led to greater innovation, leading to greater consumer control over the wireless devices they use. OS Makers and device manufacturers exercise control over the apps and services we can access on our devices through a) control of the application stores, like the Apple App Store and the Android Market, and b) device development.

Jailbreaking allows for faster innovation that provides new technologies and methods of self help to consumers because these applications don't require the same delay in approval. Specifically, the ability to install non-Apple approved apps has allowed for people to correct for concerns they have about the software and functioning of their device. For example, when the iPhone first came out in 2007 there was no way to disable SMS preview, which automatically displayed a preview of the actual content of a text message on the screen when it was received. An application to fix this arrived almost instantly in the jailbreaking community. This feature was not included in iOS until the firmware 3.0 update in 2009.¹⁸ Many iPhone users were frustrated in the delay in addressing this privacy concern. Apple had made a design decision to allow the text messages to preview. Without this exemption, the only choice users would have is to sit back and wait for Apple to correct the problem. Jailbreaking allows for users to take a proactive approach to solving these problems. It also puts pressure on Apple to address concerns with its devices based on user experience and competition. The official Apple App Store is not sufficient to apply this pressure since the approval process is controlled by Apple.

The Apple App Store's policies often deny apps that change the user experience. Many apps available through Cydia are barred from the App Store due to Apple's App Store policies intended to maintain a specific user experience. The app DisplayOut allows mirroring of applications over HDMI for those apps that fail to support mirroring natively. Mirroring is when the display of the iOS device is duplicated on another monitor. DisplayOut is barred from the App Store because it needs to run actively in the background, a feature that Apple does not allow.¹⁹ Apple originally did not allow any multitasking or background apps.²⁰ Apple has since loosened this policy to allow for some multitasking, but still has restrictions on background activity.²¹ Jailbreaking allows consumers to make the decision if they want to allow apps to run in the background.

There are also numerous apps available on Cydia that allow users to customize the

¹⁸ Sebastien, Hide SMS Preview in iPhone OS 3.0, iDownloadBlog (Jun 25, 2009), <http://www.idownloadblog.com/2009/06/25/hide-sms-preview/>

¹⁹ <https://developer.apple.com/library/IOs/#documentation/iPhone/Conceptual/iPhoneOSProgrammingGuide/ManagingYourApplicationsFlow/ManagingYourApplicationsFlow.html>

²⁰ Apple to allow third party iPhone Apps to run in the Background?, iPhone Hacks (May 16, 2009), <http://www.iphonehacks.com/2009/05/apple-to-allow-third-party-iphone-apps-to-run-in-the-background.html>

²¹ http://support.apple.com/kb/HT4211?viewlocale=en_US&locale=en_US

home screen such as Winterboard and Dreamboard. One of the most popular apps on Cydia is SBSettings.²² SBSettings adds a pop up window of the most popular settings, like brightness and Bluetooth, allowing users to change these settings without going through the full list of settings. Apps like this are barred from the App Store since they change the user experience. These apps give consumers greater control over their devices and encourage technological advancement.

Jailbreaking allows consumers to learn how their devices work. Americans have reached the point where smartphones and tablets are no longer mysterious black boxes that no one understands. Consumers want to know how their devices work and what information their devices are recording. Recently a program called Carrier IQ, a spyware program that recorded location, key presses, web history as well as other information, was discovered on many smart phones, both Android and iOS.²³ This program was included on both Android and iPhone by the manufacturers.²⁴ The only way to remove Carrier IQ was to jailbreak, or root, the phone. Jailbreaking allows consumer to download apps that let them better monitor performance statistics, real signal levels (dB on the cell antenna), and battery condition of their device. For examples, the app Battery Logger Plus, available for jailbroken iPhones and iPads, provides consumers with addition information of their battery usage.²⁵

In addition to new features and performance monitoring, jailbreaking gives users the ability to ensure the security of their wireless devices and to gain more understanding and control over how their phone functions. Smartphones are often tied to a two year contract. Unfortunately these 2 year contracts do not mean two years of operating system updates. For Android, for example, the responsibility of providing operating system software updates lies with the cell phone service provider for each model of phone. Often the service provider will not continue to update Android for all the phone models, even if the phone manufacturers provide updates. The less popular phone models get abandoned, leaving consumers vulnerable to security flaws.²⁶ A chart created by Michael Degusta illustrates that a vast number of Android-based phones still under contract had operating systems that were 3 or more versions behind the current version.²⁷ Jailbreaking / rooting the phone allows the consumer to continue to improve their phone and ensure security throughout the lifetime of the device.

Conclusion

²² Will Shanklin, The best Cydia apps, geek.com (Jan 25, 2012) <http://www.geek.com/articles/mobile/the-best-cydia-apps-20120125/?page=1>

²³ Elinor Mills, Android researcher: Carrier IQ 'diagnostic' tool really a rootkit spy, CNET (Nov 17, 2011), http://news.cnet.com/8301-27080_3-57326974-245/android-researcher-carrier-iq-diagnostic-tool-really-a-rootkit-spy/?tag=mncol;txt

²⁴ Id.

²⁵ Track Battery Levels of Your iPhone with BatteryLogger Plus, The TechJournal.com (Feb 3, 2011), <http://thetechjournal.com/electronics/iphone/track-battery-usage-levels-of-your-iphone-with-batterylogger-plus.xhtml>.

²⁶ Robin Wauters, Charter: Android Fragmentation, techcrunch (Oct 27, 2011) <http://techcrunch.com/2011/10/27/charted-android-fragmentation/>

²⁷ <http://theunderstatement.com/post/11982112928/android-orphans-visualizing-a-sad-history-of-support>

Jailbreaking allows consumers to truly own their devices. Without jailbreaking consumers would be subject to a monopoly that would lead to censorship and stagnation of technology. Tablets and smartphones are quickly becoming just as powerful and useful as personal computers. It is only logical that these devices gain the same freedom of software choice that users have enjoyed for years with PCs. Jailbreaking of smartphones and tablets increases innovation and competition and is a benefit to the American consumer.

B. Proposed Class 7B: An exemption to Section 1201(a)(1) is still necessary for remix video creators to meaningfully engage in non-infringing creativity by extracting content from DVDs without unintentionally triggering assertions that their actions are prohibited by law.

One need not look beyond the first page of YouTube.com to discover videos that contain content that once existed on a DVD. These ubiquitous videos, remixes, and vids,²⁸ consist of both images and sounds of copyrighted material that have been transformed into important noncommercial commentary or criticism of societal issues, and thus are non-infringing fair use or are protected by the First Amendment. Since this reuse and remix is in no other way illegal, it is important to avoid needlessly chilling this speech in direct conflict with the protections provided under the Copyright Act or Article 8, Section 1 of the Constitution. Strict adherence to Section 1201(a)(1) has a significant negative impact on the ability of everyday internet users, and the vast spectrum of creators who share online, to obtain clips from DVD media in order to create works which would otherwise be protected under fair use.

Furthermore, silencing otherwise legitimate free speech and cultural activity is not only harmful to society, but it is counterproductive to the goals of fair use. Therefore, NMR agrees with and supports continuation of the Proposed Class 7B exemption to the Section 1201(a)(1) anti-circumvention laws for the following reasons.

First, the proposed exemption is for a very limited, narrow use – that is, for only use that is noncommercial and noninfringing, such as fair use where the purpose and character of the reuse of an underlying work is transformative and noncommercial. Secondly, because the exemption is narrow, copyright owners retain the right to pursue individuals that post content that the copyright holder does not believe falls under fair use. Third, creators that reuse video in fair use need to integrate the highest quality video clips available into their work and they should not be made to settle for lower quality clips obtained by deficient, yet potentially legal, video capturing technology. Finally, many of these creators often do not have access to legal advice or counsel and are therefore subject to the whim or intimidation of large copyright holders who usually have legal counsel readily available.

²⁸ Remixing is defined as the “taking [of] material... such as songs, texts, or images and remixing it into [its] own artistic creation” as defined by The Pew Internet and American Life Project on Remix. Videos or “vids” is a combination of clips from one or more sources combined with music, often in order to comment on the works in question.

1. The proposed exemption is limited to uses that do not infringe copyright and it is intended to afford creators and remix artists an opportunity to fully assert their fair use defense in a legal proceeding before such a defense is precluded as a result of Section 1201(a)(1)'s threat of liability.

This exemption should be extended because it protects only a very narrow use that is already protected under the Copyright Act -- uses that are determined to be fair. Without this exemption, creators do not and will not get the opportunity to fully assert their legal defense of fair use because circumvention of an access control measure would allow the copyright holder to force a takedown of the reused video, even if the remix is clearly noncommercial or educational.

This fact remains true today, especially since many of the remixed videos online today have strong fair use arguments. These videos range from political, social, and cultural commentary to scholarly videos, many of which utilize DVD material to help convey their message. Many videos that reuse content online are inherently transformative because the purpose of such videos go beyond providing mere entertainment and instead are meant to comment, criticize, or educate the public. Due to the low cost of production, and the growth of the internet and social media as low-cost distribution platforms, there are numerous examples of videos available on the internet that reuse existing content for noncommercial and noninfringing purposes. Often there is no other way to convey the same transformative messages without utilizing certain copyrighted clips.

Take for example, pop culture critic Anita Sarkeesian, the creator and producer of the Feminist Frequency, an online web series that deconstructs popular culture texts from a feminist perspective. Ms. Sarkeesian, who transforms clips legally obtained from DVDs into fair use videos, confirms that, "increasingly, video is the medium which the younger generations engage with... [it] is a much more compelling and engaging experience than reading books, articles and essays." Ms. Sarkeesian understands the importance of using videos to keep her audience engaged. Without this exemption, her educational message and fair use criticism would be severely hindered by strict adherence to Section 1201(a)(1).

The freedom of speech and expression of Ms. Sarkeesian and other creators is an essential part of American society. Indeed, the remix and reuse of content is becoming less of a particular subculture, and more of a common way that everyday internet users interact with the culture around them. If creators do not have an exemption available to rely on when faced with legal challenges, much of the criticism and speech that is ubiquitous today could be muted.

Another example is that of Sue Wilson, an Emmy award winning journalist and director of the media reform documentary "Broadcast Blues." Ms. Wilson specifically makes "videos to comment on how Radio and TV are misleading the public." She hopes to "expose lies in the media" and has stated that as a "documentarian and media critic, it is important to be able to use examples of the media to make a point of how they are behaving. Without these clips, [the criticism] means nothing." As one can see from the perspective of Ms. Wilson, Ms. Sarkeesian

and other creators that rely on content reuse to convey their message, using clips from DVDs is an essential element in their efforts to express themselves share their perspectives.

Without this exemption, Ms. Wilson, Ms. Sarkeesian, and other creators would be unable to make and distribute otherwise legal content without violating Section 1201(a)(1), which would immediately trump any fair use defense they hoped to exercise. If there is no exemption offered to Section 1201(a)(1), creators could be liable even when the work clearly falls within the confines of fair use. Ms. Wilson and Ms. Sarkeesian's work is representative of thousands of other creators who rely on this exemption regularly to reuse content. An exemption allows a safety valve to avoid making behavior illegal that is permitted by copyright law and encouraged by the Constitution.

2. This exemption does not modify existing fair use law nor affect copyright holders' ability to pursue alleged infringers if the remixed work does not fall within the narrow exception of fair use.

Granting this exemption does not strip the copyright holder of their rights under copyright law. Nor does this exemption allow the creator or remix artist to use the copyrighted work in an infringing manner. What and who this exemption protects is a limited and narrow subclass of individuals who post works online that clearly fall within the contours of fair use.

If the copyright holder can show that the use of their work is not fair the holder may still exercise all legal remedies available to her under the law because this exemption applies only to content that has been made from works legally obtained and reused legally. Copyright holders, for example, can still utilize DMCA takedown notices as well as cease and desist letters to pursue infringing content. In no way does this exemption carve out a new defense to copyright infringement, nor will it open up the floodgates to infringement. This exemption merely allows creators to exercise the fair use defense currently granted to them under the Copyright Act.

An example of when an individual would still be held liable includes situations whereby the individual bypasses the anti-circumvention technology of a DVD and either uploads the entire work to the internet or uses the work in an infringing manner. Similarly, an individual who distributes physical infringing copies of the DVD would also be guilty of copyright infringement.

In sum, this exemption pertains only to a specific subclass of individuals who legally obtain a DVD and proceed to use advanced software and technology to extract, or "rip," limited clips for otherwise non-infringing purposes from that DVD. This exemption does not limit liability for direct or secondary infringement, meaning the copyright holder can still pursue and enforce all their legal rights under copyright law.

3. An exemption to the Anti-Circumvention laws is necessary so that creators making legal reuses of content can obtain the highest quality content. Moreover, a fair use defense is not and contingent upon the quality of the media used to create a derivative work.

High quality content is a top priority for creators that reuse content, and the ability to extract samples from DVD media allows creators to produce high quality works and to communicate their intended message. The ability to communicate one's contemplated message does in fact depend on the quality of the video sample acquired, especially as high definition video becomes the standard. If this exemption were not allowed, creators that reuse content legally would be unfairly limited to communicating their message in substandard quality.

Creators who reuse video understand the importance of quality, and know that subpar video clips impinge on the effectiveness of their message. Take for example San Diego filmmaker and video creator, Jon Monday. When asked about the importance of quality to him and his audience, he stated, "It is extremely important, as the video quality directly translates to the 'watch-ability' of the final product. American consumers are very quality conscious and will pay more attention to well produced documentaries, which include high quality video." When the quality of the content is tied so strongly to the potential viewership, it can be expected that creators will strive to source only the highest quality video clips.

Another factor supporting this exemption is that while fair use is decided on a variety of factors, the quality of the media reused is not one of them. The Copyright Office should be wary of policies which discourage fair use by severely limiting access to high quality media without protecting real and legitimate interests of copyright owners. Relegating legal reuse of content to low quality copies is a form of limiting our ability to comment and criticize the culture that surrounds us. A fair use defense will be applicable regardless of the quality of the media used. To tie the two together runs counter to the purpose and principles of the Copyright Act. The Librarian should not limit creators' ability to use high quality media in a legal manner.

Finally, it is true that a creators may obtain DVD clips by other means that do not implicate Section 1201(a)(1). For example, if a creator were to legally access a DVD and use a video camera to record the screen, an analog method of capturing, or another method of screen capturing, the creator will not be violating Section 1201(a)(1) provisions. That said, these alternative methods yield video samples of lesser quality and do not produce the requisite high quality clips that creators and remixers require. Numerous creators we work with acknowledge this dilemma. For example, when asked what affect the quality of the media has on his legal reuse of the work, remix artist Martin Leduc says, "When I rip video... I always try to get byte-to-byte copies of the original files rather than using a 'screen capture' program because copying the files directly helps me avoid degrading the quality of my video source."

As can be seen through the aforementioned examples, creators consider high quality content as a top priority. This is especially true if they expect their video to be seen on a large screen. Creators should not have to choose between violating the law through the use of high

quality material, or avoiding liability through the use of low quality material. Such a decision has no place in copyright law nor in fair use analysis.

4. Those who participate in the noncommercial reuse of content rarely have access to legal counsel and must face the threat of a lawsuit unless they follow the strict demands of the copyright holder.

NMR knows firsthand that creators who reuse video content noncommercially rarely have access to legal counsel for guidance as to whether their actions in obtaining media for their works comply with the restrictions in Section 1201(a)(1). We are aware that there are few attorneys who work in the area of public interest internet and intellectual property law providing one-to-one assistance to these important creative communities. The result is that creators who want to post noncommercial and educational content that relies on fair use, are unaware they are violating the Copyright Act when they bypass anti-circumvention technology. Many creators incorrectly assume that as long as their work has a strong fair use argument then they are free from liability. Without this exemption, creators will be unwittingly violating copyright law without access to the necessary legal resources to know otherwise.

Further, even the limited number of creators who are aware of the anti-circumvention measures usually do not have the necessary legal advice to help them navigate the Copyright Act to their benefit. Without a thorough understanding of the Copyright Act or access to legal counsel that can advise them of the proper methods to obtain the necessary content, the creators a) could be liable under Section 1201(a)(1), b) will attempt to avoid legal liability by posting lower quality, watered-down versions of their videos or c) will simply refrain from posting content that relies on circumvention.

Lastly, the limited group of creators who manage to legally obtain the necessary content still have trouble keeping their videos online for their audience. Unfortunately, such creators face the threat of DMCA takedown notices and other similar content removals because large copyright holders are aggressive in pursuing their rights through DMCA takedowns and filtering systems such as Youtube's content ID system. Large media companies send thousands of takedown notices each month to video hosting websites²⁹ and while many of these notices do target legitimate acts of infringement, many innocent creators are also mistakenly caught in the enforcement efforts, like dolphins in a tuna net. Unfortunately, most of these creators do not know of their rights nor how to respond to such takedowns. As a result, despite strong fair use arguments, some creators are intimidated by threats from large media companies, and passively comply with such notices despite the fact that their speech is otherwise legal.

A lack of legal counsel has significant consequences for creators, who many times face large media companies' threats alone. Creators reusing content legally already face DMCA takedown notices and other informal takedown activity by copyright holders that regularly overreaches the limited monopoly we give copyright holders under the Copyright Act.

²⁹ Wendy Seltzer, Data From The Chilling Effects Clearinghouse(November, 2007), <https://www.chillingeffects.org/stats>

Introducing another hurdle for these creators by not allowing this exemption for otherwise legal reuse of content, would offer one more way to unfairly limit otherwise legal speech and creativity.

C. Proposed Class 7C: A *new* exemption to Section 1201(a)(1) is necessary for remix video creators to meaningfully engage in non-infringing creativity by extracting content from sources that are currently *not* available on DVD without unintentionally triggering assertions that their actions are prohibited by law.

The general background regarding the remix communities and practices described above in the discussion of Proposed Class #7B applies equally here. To avoid unnecessary repetition, we incorporate it by reference. Specifically, creators who engage in legal non-infringing uses that utilize non-DVD material do so for many of the same important social, political, and cultural reasons. They also care just as much about high quality content as those who access material from DVD sources. Furthermore, non-DVD rippers also face the same lack of access to legal resources as those who use DVD sources. Essentially, both groups are quite similar and usually they are one in the same. This proposed exemption applies to a different, equally important class of works – audiovisual works from authorized sources that are not currently available on DVD at the time of the reuse of the content.

In addition to the reasons provided in the previous section of this comment, NMR supports an exemption for use of material from non-DVD sources based on two additional arguments. First, the media obtained from these non-DVD sources cannot be obtained elsewhere. Specifically, the material is not currently provided on DVD. Secondly, even if the content will be provided on DVD sometime in the future, many of the commentaries on current political events or pressing social issues are time sensitive and lose their effectiveness when published too late. Because of these reasons, NMR supports the Proposed Class 7C exemption to Section 1201(a)(1).

1. The chosen content is not available on DVD nor will ever be available on DVD.

Many times, a creator wants to use certain content she notices is not available on DVD format. Furthermore, many television shows, news broadcasts, or other audiovisual works will never even make it to DVD format. As a result, the creator's hands are tied – she may either seek another format to retrieve the work or she must go without it. Creators have no other choice but to turn to other non-DVD formats to obtain the work. Such formats include Amazon Unbox, iTunes Store, Hulu.com, and many other legally streaming websites.

NMR believes these works should be treated the same by the Librarian as that of works that utilize content from DVDs because the legal reuses are the same, and the material taken from a legally obtained non-DVD source is functionally no different than material taken from a legally obtained DVD. When a creator purchases a subscription to an online video store or legally downloads a movie from a licensed vendor, the creator is merely skipping the step of physically going to their local video store and purchasing the DVD. Every other step is the same

– the remixer uses the same technology to extract the clip and uses the clip in the same fair use manner as if she purchased the DVD from a store. The technical difference between purchasing a DVD from a store or purchasing a movie from an online retailer should have no bearing on the fair use analysis, especially in light of the fact that the movie or video might never even be sold on DVD. When the remixer needs the clip to further the message in their remix, they do not always have the choice to obtain that content from a DVD. And when this occurs, the remixer should not be penalized by the strict provisions of Section 1201(a)(1).

2. Even if the content will become available on DVD sometime in the future, many of the remixes are time sensitive and creators cannot wait for the release of the DVD.

Even when certain content will eventually be available on DVD format, many remixers want to share their work in a timely fashion where the humor, criticism, or commentary is only relevant when viewed against the backdrop of current events. When a remixer must wait, sometimes even up to a year, the message loses its effectiveness or becomes irrelevant. Therefore, timing of a remix artist’s message is just as important as the message itself.

Most remixers understand the importance of timeliness. Anita Sarkeesian, the creator and producer of Feminist Frequency, an online web series that deconstructs popular culture texts from a feminist perspective, expresses the importance timeliness plays in her commentary:

“It is of utmost importance that I can access video clips of current events, whether it be news footage or movies still screening in theaters. If I am making a video about a current screening film, I need to access footage of that film in order to provide evidence for my argument. If I waited until the film was released on DVD or Blu-ray to make and release my video, I would lose my audience since the film is no longer current, interesting or compelling to my potential viewers.”

Ms. Sarkeesian is not the only creator that fears she could lose her audience without access to current footage. Another pertinent example comes from Martin Leduc, a video remix artist. He admits that his “remixes respond to very specific events that are being covered in the media. In these cases, [he] needs to get [his] clips in as timely a manner as possible so that [he] can contribute to the discussions about these events while they are still taking place.” If the requested exemption is not extended to non-DVD material, Martin will be precluded from discussing the current events that he hopes to highlight while public discussions of those events is taking place.

Without this new exemption, Ms. Sarkeesian and Mr. Leduc would be limited in their otherwise legal social commentaries on popular media and events. If they are required to wait, the messages could be lost altogether. It is important to protect this fair use by allowing creators like Ms. Sarkeesian and Mr. Leduc, and the thousands of others like them, the right to extract footage of clips that are not available on a DVD.

Finally, the need for timeliness is highlighted by political events. Political commentary is a highly protected form of fair use that relies on timely reuse of footage, and strictly limiting this exemption to DVD material will greatly hinder creators' ability to fairly and accurately comment on the political news of the day. Specifically, creators will be forced to avoid any and all anti-circumvention tools that help them gain access to clips, even if the use of those clips clearly falls within the bounds of fair use. As expressed by filmmaker and video creator Jon Monday, video clips of current events "directly relate to the objective of putting out documentaries that address timely issues. If a bill is pending before Congress, or a vote before Americans, getting timely video to illustrate the issue is at least as critical as the issue itself."

As can be seen through the examples above, it is essential that the Section 1201(a)(1) exemption not be limited exclusively to DVD use. The difference between DVD and non-DVD footage is merely technical, and limiting the exemption to DVD use will only artificially limit creators' ability to legally reuse relevant, timely material to engage in political, social, and cultural commentary.

III. CONCLUSION

For the forgoing reasons, we encourage the librarian of the Copyright Office to enact the proposed exemptions to Section 1201(a)(1) for proposed classes 5, 7B, and 7C.

Respectfully submitted,



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